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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES HERMAN O'HAGAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Statement of Facts

The government's Petition misstates a fundamental fact in the underlying action. This misstatement of the record is important to this Court's decision whether to grant a writ of certiorari here because the variance between the government's misstatement, on the one hand, and the established facts of record, on the other hand, means that the issue for which the government seeks certiorari is not actually presented in this case. The facts of record are as follows.

The indictment against respondent contained 57 counts, including 17 counts of securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 17 counts of fraud in connection with a tender offer in violation of Section 14(e) of the Exchange Act, and 20 counts of mail fraud in violation of 18 U.S.C. §1341. All 57 counts of the indictment were based on a single predicate act -- the purchase by respondent of Pillsbury stock and call options during a period in which Pillsbury was widely and publicly reported to be a takeover target.

The gravamen of the government's case is that respondent traded in Pillsbury stock and call options on the basis of material, non-public information which he obtained from his former law firm, Dorsey & Whitney ("Dorsey"), in violation of the securities laws. The crucial factual predicate of the government's case, repeatedly asserted during trial, is that respondent's investment in Pillsbury arose after he learned, during a conversation with a law partner on or slightly before August 26, 1988, of "the secret plans" of Grand Metropolitan PLC ("Grand Met") for a Pillsbury takeover. As more fully explained at pages 5 through 7 of this brief, there is simply no evidence to support this essential element of the government's case, and, in fact, the trial judge concluded that the record is directly contrary to the government's contention on this pivotal issue.

In 1987, Grand Met, a British company based in London, England, decided to "refocus" its business by (1) selling its large hotel subsidiary (InterContinental Hotels), and (2) acquiring a "branded food company" in the United States. (Vol. X, p.3).[1] According to the testimony of the then-chief financial officer of Grand Met, as of September 18, 1988, "a decision had been made in principle that we would like to acquire Pillsbury. However, the decision to launch the hostile tender offer had not been taken." (Vol. IX, p. 21) (emphasis supplied). A prerequisite to any takeover bid for Pillsbury was the sale by Grand Met of its hotel business. (Vol. X, pp. 3, 5,8). According to its then-chief financial officer, the Grand Met board required a signed contract for the sale of the hotel subsidiary before any tender offer for Pillsbury could be considered. (Vol. X, p. 23). After difficult negotiations, a contract for the sale of the hotel subsidiary was finally signed on September 30, 1988. (Vol. X, p. 17) Thereafter, the Grand Met board met on October 3, 1988, and authorized a hostile tender offer for the Pillsbury Company.

Respondent is a former attorney who invested in Pillsbury stock and call options that appreciated in value when Grand Met acquired Pillsbury. The government's theory of the case is that -- despite the fact that respondent began investing in Pillsbury in July, 1988, based on solicitations from his brokers -- respondent's investments dated after August 26, 1988, were completed while respondent was in possession of material, non-public information that he learned while a partner at the Dorsey law firm. The government alleges that by purchasing Pillsbury stock and call options, respondent breached a fiduciary duty to the Dorsey firm and to Dorsey's client, Grand Met, in violation of the securities laws.

The sole basis for the government's claim that respondent traded in Pillsbury securities on the basis of material, non-public

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[1] References herein to "Vol ___" are to the trial transcript in this case.

information is a single conversation which took place between Dorsey partner Thomas Tinkham and respondent on, or slightly before, August 26, 1988, concerning the Dorsey firm's representation of an undisclosed client of the law firm of Cravath, Swaine & Moore ("Cravath") in connection with a possible acquisition of the Pillsbury Company. The representation came about as a result of a telephone call placed on July 19, 1988 by a partner of Cravath to Peter Dorsey, a partner at the Dorsey firm, asking the Dorsey firm to act as local counsel for a Cravath client that was considering acquiring Pillsbury. (Vol. IV, p. 34).[2] Peter Dorsey accepted the representation and asked Tinkham to handle the matter.

Tinkham decided to keep the representation of Cravath's client secret, within the Dorsey firm, and thus never opened a "takeover file." (Vol. V., p. 118). Rather, he opened a file on August 4, 1988, entitled "Cravath, Re: General." (Gov. Ex. 56). There was no mention of Cravath's client or of Pillsbury in the file documents and the legal work to be performed was described as general legal work for Cravath. (Vol. V., pp. 58-59). According to the Managing Partner of the Dorsey firm, Robert Struyk, because Tinkham failed to notify Dorsey's bookkeeping department of the nature of the firm's representation of the Cravath client, any member of the firm was free to trade in Pillsbury securities in July through September 1988. (Vol. V., p. 63).[3] The Dorsey firm withdrew from this representation on September 9, 1988, and did not represent Grand Met in its takeover bid for Pillsbury which commenced on October 4, 1988. (Vol. IV, p. 60).

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[2] The transcript of respondent's trial containing the entirety of Tinkham's testimony is included in the Appendix of Respondent ("Resp. App.").

[3] Because of the Dorsey firm's size (320 lawyers) and client base, the firm controlled the trading of securities of its members through its bookkeeping department. As a general matter, when a file was opened, information about the parties involved was provided to bookkeeping. The members of the Dorsey firm were required to check with bookkeeping before trading in any securities. The information available to bookkeeping was provided at the time a file was opened. (Vol. V., p. 62).

Respondent was very active in the stock market and on August 1, 1988, held positions in listed securities with a value of approximately $5 million. Respondent first began investing in Pillsbury on July 27, 1988, when a broker, based on takeover rumors, solicited respondent for a 5,000-share purchase of Pillsbury stock for a total of approximately $180,000. (Vol. VIII, pp. 11-12). Thereafter, on August 18, 1988, another foreign institutional broker advised respondent that he had received a $9 million order to purchase 250,000 shares of Pillsbury at the market from a London, England account. (Vol. VI, p. 34). Beginning that day, respondent started on his goal of purchasing 2,500 Pillsbury options. While one order for 5,000 shares of Pillsbury stock was confirmed on September 20, 1988 (Vol. VI, p.74), the other orders placed by respondent for Pillsbury stock or call options were placed prior to August 26, 1988 -- the date on which the government alleges respondent acquired the material, non-public information which gives rise to its claims of securities fraud [4]

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[4] The government asserts at page 5 of its Petition that "[a]fter his discussion with Tinkham, respondent accumulated additional Pillsbury call options, ..." This statement is misleading. The clear implication is that respondent acted to acquire Pillsbury options on the basis of information provided him by Tinkham. But, in fact, orders for the Pillsbury options had been placed by respondent prior to the alleged August 26, 1988 discussion with Tinkham. Although respondent's orders, which were below-the-market limit orders, were not executed until late August or early September, he began ordering significant blocks of options on August 18th and had placed most of his orders for both options and stock on or before August 25th. (See Gov. Ex. 75, pp. 147-49, Vol. VIII, pp. 45-46, 113, 140-41). As the government admitted below, trades prior to August 26, 1988, could not be illegal because respondent had no insider information prior to that date. (Vol. II-a, p. 27). In its brief to the court of appeals, the government essentially conceded the Achilles heel of its argument that respondent traded on the basis of misappropriated material insider information when it admitted that respondent placed the orders for the Pillsbury securities in question prior to the conversation with Tinkham. "Although Tinkham had no way of knowing, O'Hagan had set himself on a course of accumulating an exceptional number of Pillsbury securities." (Emphasis supplied)

At the time of the Tinkham/O'Hagan conversation, Grand Met's designs on Pillsbury were no secret. On August 18, 1988, a financial columnist disclosed Grand Met's interest in Pillsbury on television, and, on that same day, a San Francisco broker advised O'Hagan that he had just completed a 250,000 Pillsbury share buy offer for a London, England client. The Wall Street Journal had reported that Grand Met had put its hotel chain up for auction to raise money for an acquisition and Investment Dealers Digest had announced that Grand Met was selling its hotel chain in order to buy Pillsbury. (Vol. III, pp. 157-58; Vol. VIII, p. 118; Gov. Ex. 57; Vol. III, pp. 141-42).

It was against this backdrop that the discussion between Tinkham and respondent took place. The discussion, lasting no more than five minutes, occurred as Tinkham was preparing to meet with partners from the law firm's corporate department to discuss whether the firm should represent Grand Met in its efforts to take over a local company. Tinkham testified that just prior to this meeting, he had a conversation with respondent "about a general policy relating to [the firm's] non-involvement in hostile takeovers of local companies." (Vol. V., p. 96) (Resp. App. 13a). Tinkham further testified that in this short conversation, respondent said that he "...understood that I was doing work on a takeover of the Pillsbury Company, and that, ahm, I would remember, as he put it, that he hated the Pillsbury Company." (Id.) (Resp. App. 14a). Tinkham testified that respondent indicated he "would be interested in working on this case." (Id.) (Resp. App. 14a).

The government's Petition asserts that "[a]lthough Tinkham declined respondent's offer to work on the case, Tinkham discussed Grand Met's plans to acquire Pillsbury's common stock with respondent." (Petition at 4) (emphasis supplied). This statement is misleading in every respect. The record is undisputed with respect to what respondent actually learned from Tinkham. Construing the

evidence regarding this conversation in the light most favorable to the government, the most that can be said is that respondent learned from Tinkham that Dorsey had been retained to represent an undisclosed client in connection with a possible takeover of Pillsbury. Respondent did not learn that the Dorsey client was Grand Met. (Vol. V, p. 106) (Rep. App. 24a-25a). Moreover, respondent did not learn any details of any takeover plan. At the time of the Tinkham/O'Hagan conversation, there was not yet a takeover plan in place at Grand Met.

The significance of this discrepancy between the government's statement and the actual record is obvious. In denying respondent's motion to dismiss the indictment, the district court found that "an essential element of the offenses" with which respondent was charged was the government's allegation in paragraph 14 of the indictment that respondent "learned his firm was retained by Grand Met to represent them in connection with a tender offer and then purchased Pillsbury stock and call options..." (Report at 14-15) (emphasis supplied). There is no evidence to support this "essential element" of the government's case. After the government rested, the district court acknowledged that the government had failed to prove this part of its claim when the court stated "...the record says he didn't know it was Grand Met's information." (Vol. VII, p. 82) (emphasis supplied).[5]

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[5] The district court's statement prompted the government to rewrite some proposed jury instructions. In connection with the new instructions, the government made the following admissions to the district court: (1) the government had "put forth [no] evidence showing that [O'Hagan] had direct knowledge that Grand Met was the bidder" (Vol. IX, pp. 79-80), and (2) "[T]here's no evidence showing whether he knew who the client was, who the bidder was." (Vol. IX, p. 80) (emphasis supplied) (Vol. X, p. 26). In light of these admissions, respondent contends that the government committed prosecutorial misconduct by stating to the jury in closing argument that "Tinkham's testimony shows that the defendant knew ... Grand Met's plans ..." (Vol. XI, p. 88) (emphasis supplied).

The government also essentially conceded at trial that it had failed to prove that respondent had obtained material information concerning Grand Met's alleged takeover plan from his law firm. Prosecutor Christopher Bebel so admitted after the government rested:

> MR. BEBEL: Well, they were victimized by Mr. O'Hagan taking information and misappropriating it to his own personal benefit. There's no specific evidence as to the manner in which he first obtained the evidence, as to whether it was by conversation or by documentation.

(Vol. VII, p. 85) (emphasis supplied).

Both before the district court and on appeal, respondent argued that the government had failed to produce evidence essential to support the charges included in the indictment, including specifically any evidence that respondent had purchased securities on the basis of "nonpublic, material" information. Respondent also challenged the legal theories under which he was indicted, arguing, inter alia, that Counts 21-37 of the indictment which charged securities fraud under Section 10(b) of the Exchange Act, 15 U.S.C. §78j(b) should be dismissed because the misappropriation theory upon which the government relied was not encompassed within the express language of Section 10(b). Respondent contended that Counts 38-54, which charged him with fraudulent trading in connection with a tender offer under Section 14(e) of the Exchange Act, 15 U.S.C. §78n(e) and SEC Rule 14e-3(a), 17 C.F.R. 240.14e-3(a) should be dismissed because the SEC had exceeded its rulemaking authority in promulgating Rule 14e-3(a).

On August 2, 1996, the court of appeals reversed respondent's convictions on all 57 counts of the indictment. United States v. O'Hagan, 92 F.3d 612 (8th Cir. 1996). The government's subsequent petition for rehearing and suggestion for rehearing en banc

was denied on November 13, 1996, with only one judge voting to grant an en banc hearing. On November 26, 1996, the government filed its petition for writ of certiorari with this Court. On December 11, 1996, the mandate of the court of appeals issued directing the district court to dismiss the indictment.

The Opinion of the Court of Appeals

While not rejecting any of the eight grounds for reversal asserted by respondent, the court of appeals found merit in two arguments in particular and, on the basis of these arguments, reversed respondent's conviction on all counts. First, the court found that neither the statutory language of Section 10(b) of the Exchange Act, nor Supreme Court precedent interpreting it, will support the use of the misappropriation theory, the theory which formed the basis for O'Hagan's Section 10(b) securities fraud convictions. Second, the court held that the Securities and Exchange Commission exceeded its rulemaking authority under section 14(e) of the Exchange Act when it promulgated Rule 14e-3(a), and omitted therefrom the requirement that a breach of a fiduciary duty must be shown in order to violate the rule. Finally, because the mail fraud counts were structured in the O'Hagan indictment so as to hinge on the validity of the securities fraud counts, the court vacated these counts as well. Judge Fagg wrote a single paragraph in dissent in which he acknowledged that the majority's opinion was "carefully analyzed" and "well reasoned," but disagreed with its result. Id

A. Misappropriation Theory.

Respondent's convictions under Section 10(b) were based solely on the misappropriation theory of securities fraud. As explained by the court of appeals, the misappropriation theory extends liability for securities fraud from corporate insiders to include "outsiders who would not ordinarily be deemed fiduciaries of the corporate entities in whose stock they trade." 92 F.3d at 616. Under

this theory, an individual commits securities fraud if he "(1) misappropriates material nonpublic information (2) by breaching a duty arising out of a relationship of trust and confidence and (3) uses that information in a securities transaction, (4) regardless of whether he owed any duties to the shareholders of the traded stock." Id. at 616-17. The focus of the misappropriation theory is on whether "the securities trader breached a fiduciary obligation to the party from whom the material nonpublic information was obtained, notwithstanding whether that party had any connection to, or even an interest in, the securities transaction, and also without concern as to whether a party who did care about the securities transaction was defrauded." Id

In concluding that the misappropriation theory does not constitute a valid basis for imposing liability under Section 10(b), the court of appeals followed the "definitive ruling" of this Court in Central Bank v. First Interstate Bank, ___ U.S. ___, 114 S.Ct. 1439 (1994), that the text of the operative statute is dispositive in determining the scope of conduct regulated. 92 F.3d at 616. Focusing on the language of Section 10(b), the court of appeals noted that the "touchstone" of liability under the statute is a finding of manipulation or deception in connection with the purchase or sale of a security. The misappropriation theory does not require "deception," but instead "permits the imposition of § 10(b) liability based upon the mere breach of a fiduciary duty without a particularized showing of misrepresentation or nondisclosure." Id at 618. This result contravenes the holdings of Santa Fe Indus. v. Green, 430 U.S. 462 (1977), and Central Bank that "the mere breach of a fiduciary obligation, without misrepresentation or nondisclosure, is not deception within the meaning of §10(b)." 92 F.3d at 618.

The court of appeals also noted a second ground for rejecting the misappropriation theory. Although the language of Section 10(b) requires that the fraud alleged be "in connection with the purchase or sale of any security," the misappropriation theory renders nugatory

this requirement, permitting liability "for a breach of duty owed to individuals who are unconnected to and perhaps uninterested in a securities transaction, ..." Id. at 617. This result is inconsistent with Chiarella v. United States, 445 U.S. 222 (1980), Dirks v. SEC, 463 U.S. 646 (1983), and Central Bank, which limit liability under Section 10(b) to situations involving a "breach of duty to parties to the securities transaction or, at the most, to other market participants, such as investors..." 92 F.3d at 619. By "evading the statutorily required nexus" that the fraud be "in connection with the purchase or sale of a security," and, instead, allowing the imposition of Section 10(b) liability even though no market participant was deceived or defrauded, "the misappropriation theory essentially turns §10(b) on its head, 'transforming it from a rule intended to govern and protect relations among market participants' into an expansive 'general fraud-on-the-source theory' which seemingly would apply to an infinite number of trust relationships." Id. (quoting United States v. Bryan, 58 F.3d 933, 950 (4th Cir. 1995)).

In rejecting the misappropriation theory as a basis for imposing Section 10(b) liability, the court of appeals agreed with the Fourth Circuit's decision in Bryan and departed from the conclusions reached by several of its sister circuits that had been reached prior to this Court's decision in Central Bank. However, the court observed "with all due respect to these courts, for the most part, they seem to adopt the misappropriation theory without conducting a rigorous analysis of the text of 10(b) and Supreme Court precedent." 92 F.3d at 621. Finally, the court of appeals focused on the need for certainty and predictability in the securities context and concluded:

> As the Supreme Court has said, the securities industry generally, and §10(b) specifically, is "'an area that demands certainty and predictability'" and "decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business'" are to be

> avoided ... The misappropriation theory undermines this interest by permitting liability to be imposed in a wide variety of circumstances involving a breach of fiduciary duty, presumably including a simple employee theft.

Id. at 622.

B. Rule 14e-3(a)

The court of appeals also reversed respondent's conviction for violation of Rule 14e-3, concluding that because the SEC had exceeded its statutory authority under Section 14(e) of the Exchange Act in promulgating Rule 14e-3, respondent's convictions thereunder were invalid. Consistent with Central Bank, the court of appeals began its analysis of Rule 14e-3(a) with the statutory text of Section 14(e). Section 14(e) makes it unlawful for any person to engage in any "fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer." Section 14(e) also authorizes the SEC by rules and regulations to "define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative [for purposes of subdivision (e)]." Promulgated pursuant to the rulemaking authority under Section 14(e), Rule 14e-3 prohibits trading in securities while in possession of material, nonpublic information, "regardless of whether such information was obtained through a breach of fiduciary duty." 92 F.3d at 623.

In his appeal, respondent argued that the SEC exceeded its rulemaking authority when it promulgated Rule 14e-3(a) by "impermissibly redefin[ing] fraud in Rule 14e-3(a) by omitting the requirement that a breach of fiduciary duty must be shown because the term fraud under §14(e) requires a breach of fiduciary duty." Id. at 624. The court of appeals agreed. The court rejected the government's argument that the rulemaking provision of Section 14(e)

is a "broad delegation to the SEC of rulemaking powers and, when properly read, it empowers the SEC" to define fraud in any way it sees fit. Id. The court concluded that the government was mistaken as to "what the plain language of § 14(e) delegates to the SEC," holding that "the enabling provisions simply permit the SEC to 'define' and 'prescribe' 'acts and practices' which meet § 14(e)'s meaning of 'fraudulent.'" Id. at 624-25.

In determining the meaning of the term "fraudulent" under Section 14(e), the court of appeals concluded that "the analytic model created by the Supreme Court's holdings in Schreiber and Chiarella, cases drawing heavily on common law principles, leads to the inescapable conclusion that fraudulent under § 14(e) must be read to include a breach of a fiduciary duty." Id. at 6625. Important to the court of appeals' conclusion were (1) this Court's holding in Chiarella that fraudulent nondisclosure for purposes of Section 10(b) required a breach of fiduciary duty, (2) the fact that "Section 10(b) and Section 14(e) are contained in the same statutory enactment [which is] strong evidence that the terms are to be given the same meaning" (id.), and (3) this Court's holding in Schreiber that the definition of "manipulative" from Section 10(b) should be used to determine the meaning of the same term in Section 14(e). See 472 U.S. at 11 n. 11, 105 S.Ct. at 2464 n. 11. Because Rule 14e-3 redefines fraud to eliminate any requirement of a breach of fiduciary duty, the court of appeals held that, even in light of the strong deference traditionally accorded to administrative rulemaking, the SEC had exceeded its statutory grant of authority in this case. Accordingly, the court reversed respondent's convictions thereunder.

C. Mail Fraud Counts

The court of appeals reversed respondent's conviction for mail fraud because it concluded that "the indictment was structured in such a manner as to premise the fraud for the mail fraud charges on the acts allegedly constituting the securities fraud." 92 F.3d at 627.

The court was careful to point out that it was not holding, as a matter of law, that where both mail fraud and securities fraud counts are brought, they are necessarily interdependent so that the dismissal of one necessarily requires the dismissal of the other. As stated by the court, "The mere fact that "O'Hagan's securities convictions have been reversed does not as a matter of law require that the mail fraud convictions likewise be reversed." Id. However, "because O'Hagan's conduct did not constitute securities fraud ..., there was no fraud upon which to base the mail fraud charges." Id. at 628.

Judge Fagg, in dissent, did not disagree with the court of appeals' finding that, in this particular case, "the indictment was structured in such a manner as to premise the fraud for the mail fraud charges on the acts allegedly constituting the securities fraud." Id. Judge Fagg simply noted that, since he would uphold the securities fraud convictions, he found no basis to reverse the conviction for mail fraud.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The government's Petition misrepresents the record, and, accordingly, the issues for which the government seeks certiorari are not actually presented in this case.

The government asks this Court to decide whether the purchase or sale of a security while in possession of material, nonpublic information constitutes a violation of Rule 10b-5 and Rule 14e-3(a) if the investor breaches a duty to the source of the information, even though no purchaser or seller or a security has been defrauded. That issue is not presented by the facts of this case.

The crucial core of the government's case, repeatedly asserted during trial and on appeal, is that respondent's investment in Pillsbury arose after he learned of "the secret plans of Grand Met." See, e.g., Vol. XI, pp. 82, 88. It is this alleged knowledge of Grand

Met's secret plans that constitutes the material, nonpublic information essential to sustain the government's claims of securities fraud. As discussed above, however, in actuality the record is uncontradicted that respondent had no knowledge of any "secret plans of Grand Met."

First, at the time respondent had his one and only conversation with his law partner Thomas Tinkham, he did not learn that the Dorsey client contemplating a takeover of Pillsbury was Grant Met. Grand Met's name was not mentioned. The district court acknowledged this fact on the record.

Second, at the time of the Tinkham/O'Hagan conversation, Grand Met's designs on Pillsbury were not secret. It had been widely reported in the press that Grand Met had put its hotel subsidiary up for auction to raise money for the acquisition of Pillsbury.

Third, at the time of the Tinkham/O'Hagan conversation, there was not yet a takeover plan in place at Grand Met. It was not until October 3, 1988, weeks after the alleged conversation, and, indeed, weeks after the Dorsey firm had resigned its representation of Grand Met, that the company authorized a hostile takeover bid.

Finally, the Tinkham/O'Hagan conversation occurred after - not before - respondent embarked on his program of acquiring Pillsbury stock and options. The alleged conversation was on or about August 26, 1988. Although some of respondent's below-the-market limit orders were not executed until late August or early September, he began ordering significant blocks of options on August 18th and had placed most of his orders for both options and stock on or before August 25th. As the government admits, trades prior to August 26, 1988, could not be illegal because respondent had no inside information prior to that date. In short, the government's case hinges on proving that respondent began purchasing Pillsbury

securities after learning from Mr. Tinkham "the secret plans of Grand Met." That simply did not happen.

This case does not present the issue of whether a lawyer breaches a duty to his law firm or its client, and thereby violates the federal securities laws, when he uses material, nonpublic information obtained from the client to trade in the securities of the client's takeover target. In consequence, if this Court were to grant certiorari, it would not reach the issue for which the government seeks review without assuming hypothetical facts not presented by, and, indeed, contrary to, the record in this case.

II. There is no conflict among the circuit courts that have considered the misappropriation theory post-Central Bank.

The Central Bank decision, issued in 1994, was widely haled by commentators and legal scholars as a watershed opinion which applied a brake to the government's attempts to regulate in the securities arena beyond the express statutory language enacted by Congress. The legal principles articulated in Central Bank are controlling here with respect to both the misappropriation theory and Rule 14(e). Despite the clear applicability of Central Bank, however, the government's Petition completely ignores this seminal decision, notwithstanding that it was, from the start, a cornerstone of respondent's appeal, referenced repeatedly in respondent's briefing. The reason for the government's studious omission of any reference to Central Bank is clear. The extension of law by judicial legislation which the government seeks cannot be reconciled with Central Bank.

The only two courts of appeals to have considered the misappropriation theory in light of Central Bank -- the Fourth Circuit in Bryan and the Eighth Circuit in the instant case -- have recognized the controlling significance of the case and have unanimously rejected

the theory as inconsistent with the principles articulated therein. There simply is no present conflict in the circuits on this issue.

In Central Bank, this Court reversed years of precedent in the federal courts and held that plaintiffs do not have a private right of action for aiding and abetting violations of Section 10(b). The Court based its decision on the text of Section 10(b), holding that with regard to the scope of conduct covered by Section 10(b), "the text of the statute controls our decisions," and noting that with respect to prior decisions "[w]e have refused to allow 10b-5 challenges to conduct not prohibited by the text of the statute." 114 S.Ct. at 1446 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977), and Chiarella v. United States, 445 U.S. 222 (1980)). Because the text of Section 10(b) "does not in terms mention aiding and abetting," the Court concluded that there was no cause of action for aiding and abetting. The Court noted in this regard that if Congress intended Section 10(b) to cover aiding and abetting, "we presume it would have used the words 'aid' and 'abet' in the statutory text." Id. at 1448.

While aiding and abetting is not involved in this case, the Court in Central Bank defined the parameters of Section 10(b) in language directly applicable to this case. The Court reiterated its conclusion in that "§10(b) is not violated [when a person trades securities without disclosing inside information] unless the trader has an independent duty of disclosure." Id. In this regard, the Court emphasized that "not every instance of financial unfairness constitutes fraudulent activity under §10(b)" and that, while "Section 10(b) is aptly described as a catchall provision, ... what it catches must be fraud. When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." Id. Finally, while the Court in Central Bank expressed its view that, in certain instances, aiding and abetting a wrongdoer ought to be actionable, it noted that the issue before it was "not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is

covered by the statute." Id. Reiterating that Section 10(b) prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act, and says nothing about giving aid to a person who commits a manipulative or deceptive act, the Court concluded:

> When a statute speaks so specifically in terms of manipulation and deception ..., we are quite unwilling to extend the scope of the statute. ... We cannot amend the statute to create liability for acts that are not themselves manipulative or deceptive within the meaning of the statute.

Id.

Central Bank builds upon, and is consistent with, the Court's prior decisions in Chiarella and Dirks, supra, both of which are here applicable. In Chiarella, the government, conceding that it was urging a novel application of Section 10(b), prosecuted an employee of a financial printer who deciphered the identities of targets of upcoming takeover bids from documents he received for printing. Chiarella was convicted at trial and his conviction was affirmed by a divided panel of the Second Circuit. The Supreme Court reversed Chiarella's conviction because Chiarella, an outsider, had not engaged in any conduct that could constitute criminal fraud under Section 10(b) or Rule 10b-5. Id. at 235. The Court explained that "there can be no fraud absent a duty to speak," and while Chiarella's conduct may have been "unfair," he did not violate Section 10(b) because he was an outsider who owed no duty to "speak" to the shareholders. Id.

The holding of Chiarella was confirmed in Dirks where the Court rejected a parity-of-information rule in setting the standards for "tippee" liability. Dirks stands for the proposition that a violation of Rule 10b-5 must include a breach of duty to the shareholders of the target corporation, and if the accused is not an insider, his conduct

must be traced back to an insider such that he has adopted the insider's duties

Taken together, Central Bank, Chiarella, and Dirks hold that Rule 10b-5 challenges are not allowed as to conduct not prohibited by the text of Section 10(b), that the deception proscribed in Section 10(b) is the making of a material misrepresentation or the nondisclosure of material information in violation of a duty to disclose; and that the deception to which the statute is directed is deception of purchasers and sellers of securities. As the court of appeals found in this case, the misappropriation theory upon which the government relies cannot survive the Supreme Court's analysis in Central Bank, Chiarella and Dirks because it expands the scope of Section 10(b)'s prohibition against "fraud" beyond the statutory text to allow for a violation without any showing of deception in breach of a duty to purchasers or sellers of the traded securities.

The government takes issue with the court of appeal's reasoning, contending that it erred in holding that the misappropriation theory does not require a showing of deception and arguing that, in any event, there was evidence of deception in this case. The government contends that respondent engaged in deception by "us[ing] his privileged position of trust and confidence to exploit [his] principal's confidential information for personal gain." (Petition at 13). Wholly apart from the obvious misstatement of facts (there is no evidence that respondent obtained any "confidential information" during his conversation with Tinkham and the record indicates that, consistent with the policy of his law firm, respondent was free to trade in Pillsbury securities at the time of the alleged conversation), deception alleged by the government does not fall with the proscription of Section 10(b). As the court of appeals recognized, and as is clear from both the Chiarella and Dirks opinions, for there to be a violation of Section 10(b) or Rule 10b-5, there must be a breach of duty between the parties to the securities transaction. See 92 F.3d at 619. Respondent owed no duty to Pillsbury's shareholders

and did not misrepresent anything to them. Accordingly, there was no deception within the meaning of Section 10(b).

The government also contends that the court of appeals erred in concluding that fraud cannot be "in connection with" the purchase or sale of securities and, therefore, cannot give rise to Section 10(b) liability, where no market participant was deceived or defrauded. The government contends that it is enough to satisfy the "in connection with" requirement that the misappropriator be shown to have traded in securities while in possession of material, non-public information.

As the court of appeals noted in rejecting this argument, however, to accept the government's position would "essentially turn[] §10(b) on its head, 'transforming it from a rule intended to govern and protect relations among market participants' into an expansive 'general fraud-on-the-source theory'." 92 F.3d at 619 (quoting Bryan, 58 F.3d at 950). The court of appeals in Bryan summarized the fallacy in the government's interpretation of Section 10(b) when it noted that the misappropriation theory "artificially divides into two discrete requirements -- a fiduciary breach and a purchase or sale of securities -- the single indivisible requirement of deception upon the purchaser or seller of securities, ..." 58 F.3d at 951.

As noted by the court of appeals in this case, moreover, the government's position cannot be squared with this Court's decisions in Chiarella, Dirks, and Central Bank which reveal that "only a breach of a duty to parties to the securities transaction or, at the most, to other market participants such as investors, will be sufficient to give rise to §10(b) liability." 92 F.3d at 619. See also Chiarella, 445 U.S. at 230 (duty to disclose for purposes of Section 10(b) arises only "from a relationship of trust and confidence *between parties to a transaction*") (emphasis supplied); Dirks, 463 U.S. at 664 n. 23 ("a violation [of §10(b)] may be found only where there is 'intentional or willful conduct designed to deceive or defraud investors'") (quoting

Ernst & Ernst, 425 U.S. at 199); Central Bank, 114 S. Ct. at 1455 ("Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which *a purchaser or seller of securities* relies may be liable as a primary violator under 10b-5...") (emphasis supplied); id. at 1446 (stating that "the broad congressional purpose behind the [Securities] Act" is "to protect *investors* from false and misleading practices that might injure them") (emphasis supplied).[6]

III. Given its uncertain legal status, the misappropriation theory should not be applied in a criminal context.

The government contends that, unless review is granted in this case, it will have been "deprive[d]" of an "important tool" with which to combat securities fraud. (Petition at 11). But, of course, it is Congress, not the courts, which decides what statutory weapons the SEC should have to combat securities fraud. And Congress has expressed doubt as to whether the misappropriation theory, as defined by the government in this case, is encompassed within the express language of Section 10(b).

In November 1988, the Insider Trading and Securities Fraud Enforcement Act of 1988 was signed into law. That legislation, enacted after the conduct here at issue allegedly occurred, created a private cause of action for misappropriation. Reflecting on the state

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[6] As a fall-back position, the government suggests here as it did in the court of appeals below that, even if the "in connection with" element of Section 10(b) were construed to require "fraud on market participants," that element is satisfied here because Grand Met was "poised to become a market participant." (Petition at 14). At the time of the alleged deception, Grand Met was obviously not a market participant, having not yet decided to commence a tender offer, a fact which the government does not dispute. The government cites no authority -- and respondent is aware of none -- which would suggest that fraud on a potential future market participant is sufficient to satisfy the "in connection with" requirement of Section 10(b).

of the law prior to the new legislation, Congress analyzed Chiarella and Dirks as follows:

> Despite the breadth of the statutory and regulatory framework for insider trading, several major court cases in recent years have established clear boundaries for prosecution of these violations. In [Chiarella] the Supreme Court held that a duty to disclose under Rule 10b-5 does not arise from the mere possession of nonpublic market information. The Court held that under Rule 10b-5 a duty to disclose only arises from a fiduciary relationship or other relationship of trust and confidence between parties to the transaction. [Emphasis supplied] In the absence of such a relationship, a trader is not liable for injuries or damages suffered by the other party to the transaction who lacked the same information as the trader nor is he subject to criminal sanction, on a theory that the trader's failure to disclose defrauded the other party to the transaction.
>
> The Supreme Court followed a similar narrowing approach in [Dirks].
>
> • • •
>
> The Chiarella and Dirks decisions establish that there is no general duty to disclose material nonpublic information before trading on it.

Report of the House Committee on Energy and Commerce to accompany H.R. 5133, the Insider Trading and Securities Fraud Enforcement Act of 1988, H. Rep. 100-910, 100th Congress, 2d Session 9 (1988), 1988 USCAN 6046 (emphasis supplied). Commenting specifically on the misappropriation theory, the Congressional Report accompanying the 1988 legislation noted that,

although the misappropriation theory "clearly remains valid in the Second Circuit ... [its status] is unresolved nationally." Id. at 6047.

It is thus clear from this legislative history that Congress, which alone has the authority to promulgate federal securities law, did not consider the misappropriation theory to be established law in 1988, contrary to the government's assertion in this case. While the interpretation by a subsequent Congress of a statute enacted by a prior Congress is obviously not controlling, see discussion at note 8, infra, the fact that the branch of government responsible for defining the SEC's authority in the securities field considered the statutory authorization for the misappropriation theory to be uncertain in 1988 is significant. Consistent with the due process clause's fair notice requirement, those accused of criminal conduct are entitled to meaningful notice of the law. See, e.g., Hynes v. Oradell, 425 U.S. 610 (1976) (holding that all are persons entitled to be informed as to what the state commands or forbids, and no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes). Buckley v. Valeo, 424 U.S. 1 (1976) (due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal). Here, the legal theory under which respondent was prosecuted was so unclear in 1988 that Congress itself expressed doubts as to the theory's existence.

Notwithstanding the doubts expressed by Congress concerning the misappropriation theory's legal roots, the government contends in its Petition, as it has all along, that the misappropriation theory is important to its ability "to ensure the maintenance of honest securities markets." (Petition at 24). As this Court has noted, however, "[t]he issue [for the courts] is not whether imposing ... liability ... is good policy but whether [it] is covered by the statute." Central Bank, 114 S. Ct. at 1448. The misappropriation theory is not referenced expressly in Section 10(b). At the time the conduct here at issue allegedly occurred, no statute creating a cause of action for

misappropriation had been enacted. There is, of course, no federal common law: "[H]owever deserving of punishment ... conduct may seem," the federal courts may punish a defendant only if Congress has specifically defined the criminal conduct and authorized the penalty. Viereck v. U.S., 318 U.S. 236, 243 (1943). Even if this Court were to conclude that an argument for implying such a cause of action in Section 10(b) could be made, there is sufficient uncertainty concerning the validity of the theory to avoid its application in a criminal context. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); United States v. Kozminski, 487 U.S. 931, 951 (1988) (the Constitution does not "tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis"). As this Court warned in Chiarella, "a judicial holding that certain undefined activities 'generally are prohibited by §10(b) would raise questions whether either criminal or civil defendants would be given fair notice that they have engaged in illegal activity.'" 445 U.S. at 235, n.20.

IV. The conflict in the circuits alleged by the government to exist with respect to the validity of Rule 14e-3(a) ignores the impact of Central Bank.

The government argues that the Court must review this case because there is "a conflict among the courts of appeals" regarding the validity of Rule 14e-3(a) (Petition at 19). Although the government is correct that, until the lower court's decision in this case, "all [three] courts of appeals that had addressed the issue had found Rule 14e-3(a) to be valid" (id.), it fails to state that not a single other appellate court had analyzed Rule 14e-3(a) in light of this Court's seminal decision in Central Bank.*

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* Indeed, only one other court of appeals has had the opportunity to consider Rule 14e-3(a) since Central Bank. However, the Seventh Circuit, in SEC v. Maio,

The government contends that the court of appeals erred in holding that the SEC exceeded its rulemaking authority when it promulgated Rule 14e-3(a) without including a requirement of a breach of fiduciary obligation; the government's objection to the lower court's holding is based on its argument that the SEC has been granted broad rulemaking authority by Section 14(e), and that rules promulgated under Section 14(e) have legislative effect and are, thus, entitled to great deference. Taking the government's argument to its logical end, however, would extend the SEC's rulemaking authority beyond the language of the statute on which it rests. As the court of appeals recognized, this argument is wholly inconsistent with this Court's holding in Central Bank that the text of the underlying statute controls in assessing the validity of an administrative rule, notwithstanding any policy-based reason advanced by the agency for extending its authority beyond that granted by the statute. Central Bank, 114 S. Ct. at 1448 ("The issue ... is not whether imposing liability [for such conduct] ... is good policy, but whether [the conduct] is covered by the statute.") An administrative rule that exceeds, or is inconsistent with, its statutory mandate is invalid. Thus, in this case, the validity of Rule 14e-3(a) ultimately turns on the plain language of Section 14(e).

The text of Section 14(e) prohibits fraud in connection with a tender offer. When subdivision (e) was added to Section 14 in 1968, it provided that:

> It shall be unlawful for any person to make an untrue statement of material fact or omit to state any material fact necessary in order to make the statement made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

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51 F.3d 623 (7th Cir. 1995), appears not to have considered Central Bank in upholding Rule 14e-3(a). There is no mention of the case in the court's opinion.

15 U.S.C. § 78n(e). This provision was enacted as part of the Williams Act. "'The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information.'" Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 8, 105 S.Ct. 2458, 2462, 86 L.Ed.2d 1 (1985); see also Piper v. Chris-Craft Indus., 430 U.S. 1, 35, 97 S.Ct. 926, 946, 51 L.Ed.2d 124 (1977) ("The legislative history thus shows that the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer.") In particular, the purpose of Section 14(e) was to "add[ ] a broad antifraud prohibition modeled on the antifraud provisions of § 10(b) ... and Rule 10b-5...." Schreiber, 472 U.S. at 10, 105 S.Ct. at 2463. In 1970, Congress added language to subdivision (e) which required that the SEC "by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative [for purposes of subdivision (e)]." Id.

In 1980, the SEC promulgated Rule 14e-3, which imposes liability for insider trading in the absence of any breach of duty. The government argues that in promulgating Rule 14e-3, the SEC was "well within its authority to define a specific act or practice as fraudulent in the tender offer setting without requiring 'the breach of fiduciary obligation or similar trust relationship'" (Petition at 18). By disposing of the requirement of breach of duty, however, the SEC exceeded its rulemaking authority because it created law beyond the text of Section 14(e). The text of the statute prohibits "fraudulent, deceptive, or manipulative acts." As explained by the Supreme Court in Chiarella, one who fails to disclose material information prior to

consummation of a transaction does not commit a "fraudulent act" unless one breaches a duty to disclose arising out of a "fiduciary or other similar relation of trust and confidence." 445 U.S. at 228. By reinventing the definition of "fraudulent act," the SEC made law beyond that dictated by the statute.

In support of its position, the government relies primarily on the Second Circuit's decision in United States v. Chestman, 947 F.2d 551 (2d Cir. 1991), a case decided before Central Bank. In Chestman, the court of appeals upheld Rule 14e-3 based on the rulemaking provision that Congress added to Section 14(e) in 1970 which authorizes the SEC to "define, and prescribe means reasonably designed to prevent such acts as are fraudulent, deceptive, and manipulative." The Chestman court interpreted this provision to mean that the SEC could by rule redefine fraud, even if the rule contravenes the definition of fraud established by this Court in Chiarella; the court held instead that all that was necessary is that the rule retain "a close nexus between the prohibited conduct and the statutory aims."[6] Id. at 560. Central Bank makes Chestman's

[6] In upholding Rule 14e-3, the Chestman court also pointed to subsequent Congressional enactments such as the Insider Trading Sanctions Act of 1984, and the Insider Trading and Securities Act of 1988 -- in which Congress did not make any substantive changes to the law -- as congressional support for the status quo. Finally, Chestman distinguished Chiarella on the ground that the latter case involved Section 10(b) -- not Section 14(e). In finding no aider and abettor liability under Section 10(b), however, this Court in Central Bank rejected arguments identical to the stated bases for the Chestman court's holding. First, as noted above, Central Bank made clear that the substantive text of the statute determines the scope of prohibited conduct. Second, in relying on the rulemaking provision in Section 14(e), which was added in 1970, rather than the substantive provision in Section 14(e), which was enacted in 1968, Chestman relied on a subsequent Congress to determine the intent of the 1968 Congress. This too is impermissible under Central Bank. "[T]he interpretation given by one Congress (or committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." 114 S.Ct. at 1452. With regard to Chestman's reliance on Congress' purported acquiescence, the same argument was made by the government and rejected by the Court in Central Bank. Id. at 1453

holding untenable, because, as this Court explained, the scope of the conduct prohibited by the securities laws is defined by the express language of the statute and, accordingly, for an agency's rulemaking to be valid, more is required than a mere "nexus" between the rule and the statute.

To accept the government's argument that the rulemaking provision in Section 14(e) permits the SEC to redefine "fraudulent practices" to exclude the requirement of a breach of duty to disclose would mean that the prohibited conduct would no longer be determined by the substantive text of the statute. This is impermissible under Central Bank. The rulemaking language of Section 14(e) permits the SEC only to "define" and "prescribe" "acts and practices" meeting the statutory definition of "fraudulent." See Chestman, 947 F.2d at 584 (Mahoney, J., concurring in part and dissenting in part) ("[T]he plain meaning of the dispositive language is that the SEC is empowered to identify and regulate, in this (then) novel [tender offer] context, the 'acts and practices' that fit within the existing legal categories of the 'fraudulent, deceptive, or manipulative,' but not to redefine the categories themselves.").

The government urges a much broader reading of the second sentence of Section 14(e), arguing that the plain language is a broad delegation to the SEC of rulemaking powers and that it gives the SEC full authority to "define" and "prescribe means reasonably designed to

(cautioning that the Court's past discussions of the dubious "acquiescence doctrine indicate its limitations as an expression of congressional intent").

Finally, the Chestman court concluded that Supreme Court cases interpreting fraud under Section 10(b) are not applicable in assessing the SEC's rulemaking authority under Section 14(e). Central Bank, however, makes clear that adherence to the statutory text applies to all sections of the 1934 Act. Although Central Bank dealt with scope of conduct prohibited by Section 10(b), the Court stated unequivocally that its textual analysis applied to all provisions in the Securities Act. See Central Bank, 114 S.Ct. at 1447 ("Adherence to the text in defining the conduct covered by § 10(b) is consistent with our decisions interpreting other provisions of the securities Acts.").

prevent" "fraudulent conduct" in the tender offer context. (Petition at 18). As the court below recognized, however, "the government conflates the language of the statute into a broad empowerment to the SEC to 'define' and 'prescribe' 'fraud'.... [T]his is not what the plain language of § 14(e) delegates to the SEC; the enabling provisions simply permit the SEC to 'define' and 'prescribe' 'acts and practices' which meet § 14(e)'s meaning of 'fraudulent.'" 92 F.3d at 625. And, because this Court in Chiarella has already defined "fraudulent nondisclosure" under the securities laws,[9] any attempt by the SEC to redefine the term to eliminate an essential component renders the SEC's action invalid.

Because the court below is the only court of appeals to analyze Rule 14e-3 in light of Central Bank, the issue of whether the Rule survives Central Bank is not yet suitable for review by this Court. Moreover, the fact that only four courts of appeal have had occasion to address the issue of the Rule's validity since its promulgation in 1980 belies the government's contention that the decision of the court below "critically weakens the government's ability to prosecute the misuse of material, nonpublic information in the securities markets." (Petition at 10)

Finally, there is one additional reason why this case is not the proper vehicle for deciding the issue regarding the validity of Rule 14e-3(a) which the government seeks to present. On the facts of this case, one never reaches the issue of Rule 14e-3(a)'s validity because Section 14(e) itself has no applicability. Violations of Section 14(e) cannot occur unless and until a tender offer is made. At the time respondent is alleged to have traded in Pillsbury stock and options,

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[9] In Schreiber, the Court explicitly held that Section 14(e) is modeled after the broad antifraud provisions of s 10(b) and Rule 10b-5. 472 U.S. at 10 & n. 10. Accordingly, the term "fraudulent" should be interpreted consistently for both Section 10(b) and Section 14(e). See id. at 7-8 & n. 6 (using Section 10(b)'s definition of the term "manipulation" to define the same term under Section 14(e)).

there was no tender offer. Respondent's last "purchase" of any Pillsbury securities occurred on September 21, 1988; the tender offer was not made until October 4, 1988.

In arguing that Section 14(e) may be violated prior to the announcement of a tender offer, the government again ignores the plain language of the statute which regulates fraudulent practices in connection with a tender offer. In Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977), this Court, after an exhaustive review of the legislative origins of Section 14(e) concluded:

> [T]he sole purpose of the Williams Act [which included the first sentence in Section 14(e)] was the protection of investors who are confronted with a tender offer. As we noted in Rondeau [v. Mosinee Paper Corp., 422 U.S. 49 (1975)] ... 'The purpose of the Williams Act is to ensure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information.'

Id. at 35.

Consistent with Piper, Section 14(e) is inapplicable to the instant case because the alleged violations occurred prior to the tender offer. Although Rule 14e-3(a) purports to extend Section 14(e) to include conduct occurring after "any person has taken a substantial step or steps to commence ... a tender offer ...," the substantive text of Section 14(e) does not provide for this extension.[10] And, under

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[10] A challenge to this part of Rule 14e-3 was made in O'Connor & Assoc. v. Dean Witter Reynolds, Inc., 529 F. Supp. 1179 (S.D.N.Y. 1981). The district court in that case upheld the Rule, basing its decision on the rulemaking provision which Congress added to Section 14(e) in 1970 which authorizes the SEC to "define and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." 529 F. Supp. at 1191.

Central Bank, the substantive text of the statute determines the scope of the prohibited conduct.

V. The Court of Appeal's reversal of respondent's conviction for mail fraud creates no conflict with any decision of this Court or any court of appeals and raises no issue of public importance.

The court of appeals reversed respondent's conviction for mail fraud because it concluded that "the indictment was structured in such a manner as to premise the fraud for the mail fraud charges on the acts allegedly constituting the securities fraud." 92 F.3d at 628. Thus, because the government had failed to establish securities fraud, there was no fraud upon which to base the mail fraud charges. Id.

In reversing the mail fraud conviction, the court of appeals was careful to point out that it was not holding, as a matter of law, that where both mail fraud and securities fraud counts are brought, they are necessarily interdependent so that the dismissal of one necessarily requires the dismissal of the other. Id. at 627. The conflict which the government seeks to create between this case and Carpenter v. United States, 484 U.S. 19 (1987), in this regard simply does not exist. The court of appeal's ruling with respect to the mail fraud counts was fact specific and raises no issue of any importance beyond this case. Accordingly, review by this Court is not warranted.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Central Bank, however, makes it clear that the substantive text of the statute determines the scope of the prohibited conduct. Because the substantive text of Section 14(e) does not provide "If any person has taken a substantial step or steps ...," the holding in O'Connor contravenes Central Bank.

Respectfully submitted.

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APPENDIX A — PARTIAL TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE JAMES M. ROSENBAUM, TESTIMONY OF THOMAS TINKHAM DATED JANUARY 25, 1994

[Commencing at page 1]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Criminal No. 4-92-219

Volume V

January 25, 1994

United States of America,

Plaintiff,

-v-

James Herman O'Hagan,

Defendant.

TRANSCRIPT OF PROCEEDINGS

HAD BEFORE THE HONORABLE

JAMES M. ROSENBAUM, and a Jury

Minneapolis, Minnesota

APPEARANCES:
For the Government — Christopher Bebel, Jon Hopeman

For the Defendant — Charles Hawkins

* * *

[85] A. Umm, well, generally my administrative matters were not billed.

Q. And is it fair to say that when you're talking about what you've talked about here, I believe your term was discussing issues that are in the best interests of the client; do you recall that phrase?

A. Yes.

Q. Not in the best interests of the law firm, correct?

A. That's correct.

MR. HAWKINS: I have no further questions, Your Honor.

MR. BEBEL: We have nothing further.

THE COURT: You may step down, Mr. Struyk. Thank you.

MR. BEBEL: We call Tom Tinkham.

THE COURT: Sir, would you step forward, please. Would you raise your right hand.

(Witness sworn.)

THE COURT: Would you please be seated. Please state your name, and spell your last name.

THE WITNESS: My name is Tom Tinkham, spelled T-I-N-K-H-A-M.

DIRECT EXAMINATION

(Thomas Tinkham)

BY MR. BEBEL:

[86] Q. Mr. Tinkham, why don't you tell us about your educational and professional background.

A. I went to college at the University of Wisconsin at Madison. I graduated in 1966. I went to Harvard Law School and graduated in 1969. I came to Minneapolis to practice law, and joined the firm, ah, that is now known as Dorsey and Whitney in 1969. For a period of a year or so I left Dorsey and Whitney and became the Hennepin County public defender, representing people in Hennepin County who were charged with crimes on an indigent basis, and I have been at Dorsey and Whitney without exception since then, and I've been there about 24 years practicing civil trial law.

THE COURT: Can you pull slightly closer to the microphone if you would, Mr. Tinkham.

BY MR. BEBEL:

Q. And you're a partner in the firm?

A. I am.

Q. And you've been a partner for approximately how many years?

A. Nineteen.

Q. And have you held any positions within the firm? If so, tell us about them.

A. Yes, I have. I have been on a number of committees in the firm, including the recruiting committee, the finance committee, the professional personnel committee, the partner [87] review committee, and, ah, I was chairman of the trial department, the litigation department at Dorsey and Whitney for three years, or three and a half years during the period '86 through '89, and I'm currently responsible at Dorsey and Whitney for the quality of practice, including issues about how we practice law, what we do in particular situations, claims made against the firm, ah, and work with various lawyers in those kinds of settings.

Q. And what types of legal related positions have you held outside the firm?

A. Ahm, numerous of them. Ah, most significantly would be in the bar association, which is an organization of lawyers, I've been president of the Hennepin County Bar Association, and president of the Minnesota State Bar Association, which is composed of about 12,000 member lawyers.

Q. Okay. Let's go to 1988. During 1988 did the law firm of Cravath, Swain, and Moore contact the Dorsey and Whitney law firm?

A. Yes.

Q. And when did you first learn that this contact had been made and tell us what the nature of the contact was, also.

A. I learned of it sometime in mid July of 1988 in a conversation with, ah, Peter Dorsey and Bob Struyk, which they told me that the firm had been contacted by a man by the name of Alan Maulsby at Cravath, and asked if we were [88] interested in participating in some work that they were involved in.

Q. And then did the — did you later learn who this work — well, let me rephrase that. Was a file opened up after this contact was made?

A. Yes.

Q. And the name Cravath was put on the file?

A. Correct.

Q. And did you speak with any Cravath attorneys yourself?

A. Ah, yes.

Q. Okay. What Cravath attorney, or —

A. I believe his name was Alan Parker.

Q. And how soon after this contact had been made did you begin speaking with Alan Parker?

A. By late July of 1988.

Q. And by that time, had you been advised as to what the nature of the services were that you were being asked to provide?

A. Yes.

Q. And what was your understanding as to the nature of those services?

A. There was a company by the name of Grand Met, ah, that was, ah, primarily an English company that was interested in acquiring all of the stock of Pillsbury Company in Minneapolis. And in connection with that, the people at [89] Grand Met would need to know a good deal about the law of the state of Minnesota as it applied to an acquisition like that. And they might also need some assistance in, umm, litigation or trial work in the event that there was litigation or trials of that kind in Minnesota involving a dispute that might develop over this proposed acquisition.

In addition, as it developed, they were also interested in, umm, whether or not Dorsey and Whitney could provide some services along the lines of introducing the people at Grand Met to various officials at the state and the county and so on.

Q. And this acquisition was to be brought about through what?

A. The acquisition was to be brought about, as I understood it, by the purchase of stock, a stock offering.

Q. A tender offer?

A. I think that's an apt — that's a word I'd use, yes.

Q. And as for these services that your law firm was to provide, who was to head up that representation?

A. Well, at least with regard to, ah, anything having to do with trial and litigation, I was.

Q. Now, after this business had been brought into the firm, did any tension or disagreement develop as to whether or not the firm should be doing this kind of work?

A. Yes, Yes, it did.

[90] Q. Okay.

A. Although, let me just say that the tension was there and preexisted this to some extent, with regard to this type of representation.

Q. And so then how soon does this tension start focusing on this representation after the business is brought in?

A. Well, within, ah, some relatively short time after I became aware of this possible representation, I also became aware that it was the desire of Bob Struyk to make sure that the corporate department was comfortable with this, and to meet with them and talk with them about that. And I then became aware that some of the people in the corporate department weren't comfortable with this.

Q. Were not?

A. Were not.

Q. And, on the other hand, people in the litigation department, what was their belief?

A. Well, generally people in the litigation department had discussed this kind of possibility before and thought that it was something that we could and should do.

Q. So you have two opposing viewpoints within the firm, generally speaking?

A. Yes, we did.

Q. And were those opposing viewpoints discussed at any meetings?

[91] A. Yes, they were.

Q. Let's go to the first meeting. Do you recall when that was held?

A. Well, I recall when it was, because I've checked my calendar a good number of times with regard to it. It was on the 26th of August of 1988.

Q. And showing you Government's Exhibit 57, is this your calendar that you were talking about?

A. It is.

MR. BEBEL: And we move that Government 57 be admitted.

MR. HAWKINS: May I also ask a couple of additional foundation questions at this time?

THE COURT: Certainly.

BY MR. BEBEL:

Q. Now, you see on Government's Exhibit 57, that there's really only one entry. Can you explain for us why there is only one entry and what brought that about?

A. Certainly. This, ah, particular document is a photocopy of a calendar that I used to keep on my desk. It's the type that sits on your desk, and it's about two feet wide and a foot and a half high. And, umm, I would then fill in each day meetings I had or appointments or court dates or meetings with clients, whatever it would be. This covers a period, August of '86, and as a part of not revealing [92] information about other clients, when I produced this to the government, I excluded from it other dates and other references to other matters, that is other client matters other than this particular one, the Grand Met one.

Q. Okay. Just to help us out a little bit, why did you not want to review matters relating to other clients?

THE COURT: I think I just thought — it only concerned other cases and other issues.

MR. BEBEL: Okay. And we once again move that the exhibit be admitted into evidence.

MR. HAWKINS: May I —

BY MR. HAWKINS:

Q. Does this represent your calendar for the entire month of August as it relates to anything to do with Grand Met?

A. Well, that was the intent of doing it this way. I can't, without going back and actually looking at it, I can't tell you that to a hundred percent certainty.

Q. But to the best of your recollection, that would reflect the only entry you've made in the entire month of August relating, or that was relevant to this case?

A. You know, I don't have an independent memory of that before I'd check again.

MR. BEBEL: Your Honor, I'd move it would be provisionally admitted.

MR. HAWKINS: I don't have objection to that.

[93] THE COURT: It's admitted under all circumstances by agreement.

BY MR. BEBEL:

Q. Okay. And the document reflects that what happened on the 26th of August?

A. Well, my calendar reflects that I had a meeting with Robert Struyk, et al, that morning.

Q. Okay. And that entry on your calendar, does that relate to the meeting where this tension that developed within the firm was discussed?

A. It does.

Q. And can you give us your best recollection as to who attended that meeting?

A. Well, I know I was there, and I know Bob Struyk was there, and I recall that two people from the corporate department by the names of, umm, Rich Swanson and Lee Mitou were there. It may be that Peter Dorsey or Warren Spannaus were there for a time, but as I sit here, I don't remember them being there specifically.

Q. And generally, what was discussed and what was decided?

A. What was discussed was the pros and cons of representing someone who was going to acquire a substantial local company. The people, Rick Swanson, and Lee Mitou, took the position that it was inadvisable, it was wrong, inappropriate for us to do so because many of our clients [94] who were in similar situations, that is they were corporations in Minneapolis, who would be unhappy with our representing somebody who was kind of acting in a threatening way to another corporation, that was local.

I took the position, and I think Bob Struyk agreed with me, that in this situation, ah, this was ordinary, normal legal work that we were being asked to do. Umm, that, ah, as long as what we were being asked to do was substantial legal work, ah, of a

kind regularly done, it should be something that we could do and our clients ought to perceive it as appropriate.

We recognized a tension and a disagreement existed. It wasn't resolved, except that we decided we would go forward with the representation but continue to monitor it to insure that in fact we were doing substantial legal work.

Q. Bottom line, you decided to stay with the case for the time being?

A. Correct.

Q. And prior to this August 26 meeting, were you giving any thought to what your position would be at the meeting?

A. I — I was.

Q. And during the period before the meeting, did you receive James O'Hagan as a visitor at your office?

A. I did.

Q. And approximately when did this occur and what was [95] discussed?

A. I — I know that that meeting was before August 26.

Q. Why do you say that?

A. Because I discussed with him at the meeting what I was going to say and what position I was going to take at the meeting that was scheduled for the 26th. So I know the meeting preceded

that day. Umm, my best memory is that it was a few days before then, but I can't be any more specific than that.

Q. Well, what causes you to think it was a few days before the August 26th meeting?

A. Because I had the meeting on my mind, enough so that I asked, umm, Mr. O'Hagan specifically about what position we ought to take when I went to that meeting.

Q. And his response, generally?

A. His view was, ah, the same as mine at the time, that, ah, this was the kind of work that, umm, Dorsey and Whitney ought to be able to do in the appropriate circumstance.

Q. And during this meeting, did the defendant, James O'Hagan, ever say anything with respect to Pillsbury?

A. Yes, he did.

Q. Well, maybe I better back up. Can you sort of walk us through the meeting and tell us how the conversation began?

A. Well, I remember, ah, being at my desk, and I remember, ahm, Jim O'Hagan coming to my — into my office and standing [96] inside the doorway And talking with me as he was standing there. He began the conversation by saying that he understood that I was doing work on a takeover of the Pillsbury Company, and that, ahm, I would remember, as he put it, that he hated the Pillsbury Company —

Q. And what did you you understand that reference to refer to?

A. I had known for a good long time that Jim had a substantial case against the Pillsbury Company, or one of its subsidiaries, Green Giant, and that, umm, there had been a relatively high degree of animosity in the lawsuit. So that when he said that, that's what I thought, that he was referring to the case involving Green Giant.

Q. Okay. Keep walking us through it.

A. In any event, he, ah, he said, well, you know, I, I, umm, I don't like them, or I dislike them, and I would be interested in working on this case. Umm —

Q. And what was your reaction to that?

A. Well, my reaction was negative, and I said, umm —

Q. Why was your reaction negative?

A. My reaction was negative for two reasons, as I recall. First of all, umm, Jim O'Hagan and I had substantially different manners of approaching cases. And, umm —

Q. Explain that —

MR. HAWKINS: Well, Your Honor, that's irrelevant, [97] beyond that.

THE COURT: Sustained.

BY MR. BEBEL:

Q. Okay. So what was — what was your reaction?

A. What did I say?

Q. What did you say?

A. What I said to him was that I didn't believe that there was, umm, a lot of legal work developing on this. And, umm, it didn't seem like that would be something that would make any sense. Or words to that effect.

Q. And did you, ah, also alert him as to this tension?

A. Well, I remember saying to him t' at there was a question about whether we were going to continue this representation, and that I had to go to a meeting to discuss this with our corporate department that was taking its usual position that we shouldn't be doing this. And I ask him what he thought about it.

Q. And that's when he gave the response you previously discussed?

A. Correct.

Q. Now, who was more senior in the firm at the time?

A. He was.

Q. And does the fact that he was more senior in the firm have any bearing on your ability to remember this conversation?

[98] A. Yes.

Q. Explain that.

A. In a law firm, a large law firm like the one we were both in, typically the more senior lawyers are in charge of matters and the more junior lawyers work for them, and in fact, ahm, when I had started at Dorsey and Whitney and for six or seven years thereafter I worked on a number of matters, ah, for Jim O'Hagan when he was in charge of them. So that this was an unusual circumstance for me with somebody who was more senior in the trial department coming and asking me to work on a case where I was in charge.

Q. Okay. Let's move on a little bit. At the time he came into your office and began discussing this, did you — well, why was it that you were willing to discuss this matter with him? Did you think you were doing anything improper?

A. No. And as to the question why, umm, the first answer — the first part of the answer is because he asked, and the second is because he was a partner in the Dorsey and Whitney law firm.

Q. Well, what does that mean?

A. Umm —

Q. In what way did that, ah, allow you to think it was proper to discuss this with him?

A. Well, there may be some circumstances in which we try to keep information narrowly confined within the law firm about [99] a client matter. The practical fact is, and the legal fact is, that all partners are charged with the same knowledge, whether they really know it or not. So that, umm, any partner in the law firm has the right to know what is being done by the partnership. That's the essence of a partnership, as far as I'm concerned.

Q. Well, at this time, the time of the discussion, did you have any indication that the defendant was purchasing Pillsbury securities?

A. None at all.

Q. At any time during August did you obtain information of that sort?

A. Not one suggestion.

Q. How about September, at any time during September did you ever obtain any information whatsoever that suggested that the defendant was purchasing Pillsbury securities?

A. Not the slightest hint.

Q. What causes you to be so sure of that?

A. Because my reaction would have been very, very substantial had I learned of that or heard of that during that period of time.

Q. Why?

A. I would have considered that to be a very significant problem for the firm and an enormous breach of trust.

Q. Why?

[100] A. Because as lawyers representing a client, we have an obligation not to use information from that client for our

own benefit. Under the securities trading laws of the United States, as I understand them, it would be improper to use information gained through private client communications to profit individually by virtue of trading. For both of those reasons, that is it's a breach of ethics and it's a breach of the law, I would have been more than a little upset.

Q. And ultimately, was a tender offer for Pillsbury securities made?

A. Ultimately it was.

Q. October 4th sound like the general time frame?

A. All I can tell you is that I remember it was early October.

Q. And do you recall whether the SEC, Securities and Exchange Commission, then ever made any contact with anyone at the firm?

A. I remember about a month later being called to a meeting in Peter Dorsey's office regarding a call from the SEC.

Q. And after that did you ever have a conversation with Bob Struyk that related to the defendant's trading?

A. Ah, yes, I'm sure I did.

Q. Do you recall generally what position you took as to the defendant's trading during those conversations, during that [101] conversation?

MR. HAWKINS: Your Honor, what his position is on

November 22nd is irrelevant. Or November 2nd, whatever, at this meeting.

MR. BEBEL: Your Honor, I believe we opened the door to this questioning —

THE COURT: Overruled. Or sustained. I beg your pardon.

MR. BEBEL: We have nothing further, Your Honor.

THE COURT: All right.

MR. HAWKINS: May we approach the bench, Your Honor?

THE COURT: Surely.

(Side bar discussion.)

MR. HAWKINS: I'm just curious about time, Your Honor.

THE COURT: We're going to go till quarter past.

MR. HAWKINS: Okay. That's all I wanted to know.

MR. HOPEMAN: I didn't hear any of that.

MR. BEBEL: We're going to quit quarter past.

(Open court.)

(Discussion off the record.)

Appendix A

THE COURT: Cross-examination, counsel?

MR. HAWKINS: Can I see it? Thanks. (To witness.)

[102] CROSS EXAMINATION

BY MR. HAWKINS:

Q. You've got a envelope with the received stamp January 4th, 1994, 1604, is that where your office is?

A. It is.

Q. And this was delivered to you?

A. It was.

Q. And it's from Chris Bebel?

A. This was delivered to me, the two statements at the end. The articles I put in there myself this morning.

Q. Okay. And the statements were sent to you to review before you came in to testify, sir?

A. That's correct.

Q. Is that correct?

A. That's correct.

Q. And then you also put in these other files?

Appendix A

A. I put in some newspaper articles.

Q. These newspaper articles?

A. That's correct.

Q. Now, those relate to a situation called Allegheny, correct?

A. That's correct.

Q. Now, during 1987 and 1988, you were involved in some litigation relating to Allegheny, correct?

A. Correct.

[103] Q. And do you recall having a conversation with Mr. O'Hagan relating to the subject matter of Dorsey and Whitney not becoming involved in litigation relating to hostile takeovers?

A. I recall a, the discussion that I just related about hostile takeovers in connection with Pillsbury.

Q. Did you have any discussion with him in regard to Allegheny?

A. Not that I recall.

Q. On August 26th, 1988, you were in the midst of working on Allegheny, were you not?

A. Ah, yes, I was working on a brief.

Q. You had stuff all over your office, as a lot of lawyers working on briefs do, relating to the Allegheny case?

A. That would have been true for most of '87 and most of '88.

Q. Now, this conversation on August 26th between and you Mr. O'Hagan that you related, only lasted approximately three to five minutes, correct?

A. First of all, I don't believe it was on August 26th.

Q. I apologize.

A. That's all right. It was sometime — somewhat earlier than that, and I agree with your time frame. My memory tells me it was relatively short, and he stood in my office during it.

[104] Q. It was a very what could be considered short and concise conversation, correct?

A. Well, it was three to five minutes, I'll agree with that.

Q. And in that regard, you recall during that conversation ever talking about — let me go back for a second. You're the head of the trial department at this time, correct?

A. I was, yes.

Q. You're the guy that you have to go to to talk about issues relating to matters in the department, correct?

A. Some issues, sure.

Q. One of the issues that you had to deal with with Mr. O'Hagan was an issue relating to partners sharing secretaries, correct?

A. Yes.

Q. And one of the issues that Mr. O'Hagan advised you he needed to talk to you about on or about the 26th was this issue about having to share a secretary with partners, correct?

A. I think that general issue was quite a bit earlier than this.

Q. You don't recall any of that on the 26th or thereabouts when this conversation occurred?

A. I don't recall anything on the 26th or 25th or 24th having to do with that specific subject, no.

[105] Q. Now, there's no question in your mind that at least the conversation you've related here occurred no earlier than August 24th, correct?

A. Well, all I can tell you is what I said before. I think it was a few days — before the 26th. Whether it was the 25th, the 24th, the 23rd, I can't tell you. I don't think it was earlier than that.

Q. And you've given sworn testimony to that fact previously, correct?

A. I — I've given some sworn testimony in this matter and I know I've talked about the date at which this meeting occurred, so I assume you're right.

Q. Now, there's no question, however, it occurred prior to the meeting with Struyk, possibly Peter Dorsey, possibly Warren Spannaus, Mitou, Swanson, and yourself, correct?

A. That's my best memory.

Q. You never advised any of those individuals at that meeting about a conversation you had for three to five minutes with Mr. O'Hagan within the prior 72 hours, correct?

A. I don't recall specifically doing that.

Q. And security —

A. Although I may have. I just don't recall doing that.

Q. And security, indeed, was an issue, correct?

A. Security in what respect was an issue? I'm sorry, I don't understand your question.

[106] Q. The representation of Grand Met.

A. It was important that the representation of Grand Met in this particular context not be made public.

Q. You never made that known to Mr. O'Hagan, correct?

A. I didn't have that conversation with him, no.

Q. And during this three to five minute conversation, during whatever time frame you had, you never talked to Mr. O'Hagan about Grand Met, correct?

A. You mean specifically mentioned Grand Met?

Q. Correct.

A. I don't remember.

Q. That's something you would have remembered, however, if it had happened, correct?

A. I don't know.

Q. It was important at the time, correct?

A. I don't think that who the acquirer was was particularly important in the conversation, no.

Q. That you guys were having?

A. I don't think it was important in our conversation.

Q. Because what the conversation was about was the general policy at Dorsey and Whitney about being involved in hostile takeovers, correct?

A. No. The conversation was about two things. The first of which was Mr. O'Hagan's desire to work on this specific matter, and the second was our general policy.

[107] Q. So part of the conversation was about a general policy relating to noninvolvement of hostile takeovers of local companies, fair?

A. That's correct.

Q. And the second part of the conversation was Mr. Hagan's willingness to work on this matter, correct?

A. Well, except you have them reversed. That was the first part of the conversation.

Q. I'm not trying to put them in any order, I'm just trying to identify the subjects.

A. Those are the two subjects.

Q. Now, talking about the subject of Mr. O'Hagan volunteering to work on a matter, would be absolutely extremely unusual, based upon his position in that law firm and your prior relationship with him, correct?

A. As I said, it would be unusual.

Q. Highly unusual, correct?

A. Well, it's unusual enough so that, umm, it hadn't happened more than once or twice to me.

Q. Never happened with Mr. O'Hagan before, correct?

A. That's correct.

Q. And is it fair to say that when you went to this meeting on the 26th, that you had your own views on what should occur, correct?

A. That's correct.

[108] Q. And one of the views, without any question about it, was you should be involved in this litigation if indeed, quote, unquote, it engaged, or involved substantial legal work. Correct?

A. That was my view, that that's what we should do.

Q. If it did not involve substantial legal work, you didn't feel the firm should be involved, correct?

A. That is correct.

Q. So if it involved handshaking, political-type stuff, you didn't know whether you should be involved in just that limited role, true?

A. I would not have been comfortable doing that.

Q. And you also would not have been comfortable, to use a lawyer's term, to carry Cravath's hand — or briefcase?

A. That's correct. And that means to me that I'm not doing legal work I'm doing carrying box work.

Q. Grunt work.

A. Well, whether it's grunt — that's not a legal term.

Q. No, military term?

A. To me it means that I'm not being asked to do legal work in the sense of practicing law.

Q. And anything like that is normally delegated to an associate, correct?

A. Yes.

Q. Now, another reason that you espoused at this meeting in [109] support of your position to be involved adversely to Pillsbury on behalf of Grand Met was because everybody knew Pillsbury was on its last legs and they believed that a makeover was imminent, correct?

A. I think that, ah, my view was that Pillsbury wasn't in very good condition, and that the perception that people in the community would have was that it wasn't so much perhaps hostile as helping out, because of the perception in the community that Pillsbury wasn't the strongest of companies.

Q. And you believed and espoused at this meeting that their takeover was imminent, correct?

A. I don't recall specifically using those words, but that was my — my general feeling was that something was going to happen with Pillsbury sooner or later.

Q. And so whether you were representing an outside company or not didn't make any difference, fair?

A. Oh, it made a difference. But this is one of the things that you weigh in the balance. One of the factors you take into consideration.

THE COURT: Just a second, counsel. As a matter of fact, why don't we take a break, this would be a reasonable time to take a break for lunch.

MR. HAWKINS: May I finish just this one line of questioning I was on?

THE COURT: You certainly can.

[110] MR. HAWKINS: I appreciate it, Your Honor, I'm sorry.

THE COURT: No problem. No problem.

Q. This is your copy, correct?

A. This is what Mr. Bebel sent me a couple days ago.

Q. Whose writing is it?

A. Mine.

Q. Your corrected version?

A. Yes.

Q. You went through and you adopted what was said in there, changed it to say the way you felt you agreed?

A. To an extent, yes.

Q. And is it fair to say, read along with me, Tinkham said that he believed they should —

MR. BEBEL: Your Honor, we object to reading documents that are not in evidence.

MR. HAWKINS: It's going to be impeachment, Your Honor.

MR. BEBEL: Your Honor, it can't be impeachment based on the testimony.

THE COURT: Well, I think we will pick it up after lunch.

MR. HAWKINS: Okay.

THE COURT: All right.

[111] MR. HAWKINS: Oh, this is yours.

THE WITNESS: Yeah.

THE COURT: Ladies and gentlemen, we will return at, ah, why don't we come back at 2 o'clock. Two. One of those bankers lunches today, ladies and gentlemen.

(Jury in recess.)

THE COURT: Counsel, may I suggest that it would be prudent for you to get your program together so that rather than introducing two exhibits, 56 and 11, or whatever it is, you pick your favorites and get them together. Somehow I was under the impression that the government was of a view that what you offered may not have been exactly what you were supplied, and I know you were — whatever it is, why don't you guys straighten this out if you can.

MR. HAWKINS: I can explain exactly what the problem is.

THE COURT: Oh, I'm sure I don't need an explanation if you can take care of it. Otherwise we'll go into it as you need.

MR. BEBEL: We'd like to make this exhibit, the documents that were taken off of they have nothing to do, ah, with his Exhibit entirely different. Mr. Hopeman went through both sets of documents at the break, and I believe there's been inference made to the jury that —

[112] THE COURT: Oh, there's no inference to the jury, my heavens. Counsel, I've explained to them you guys just were tiffing.

MR. BEBEL: We thank you for caring, then.

THE COURT: Close enough, as well as I'm able.

MR. HAWKINS: The only exception I take, they have nothing to do, Defendant's Exhibit 19 is the quote, unquote, billing memorandum that was generated on November 10th, 1988 —

THE COURT: I bet you can straighten it out.

MR. HAWKINS: This, well, I just want the record to reflect what this is.

THE COURT: It's reflected whatever you want, counsel. Straighten it out, will you?

MR. HAWKINS: I think it is straightened out.

THE COURT: You guys can get your heads together and I'm sure you can handle it.

Now, then, where are we with respect to a statement — a

holographic statement and personal adoption of a statement of a witness as opposed to being a straight 302, which I suspect is what you're talking about here?

MR. BEBEL: You mean reading that statement for impeachment purposes?

THE COURT: Well, I'm not sure what he has in mind here. What's impeaching?

[113] MR. HAWKINS: His position stated at that meeting, according to what he represented, what I —

THE COURT: Sir, I think you can actually step out. I'll take this up — you also can be seated. It's just more comfortable for me to stand here, folks.

MR. HAWKINS: I'm using his document that he read that he has corrected, written on, changed, which says that his opinion for continuing representation, and I'm paraphrasing, was because, and now I'm quoting, a takeover of Pillsbury was imminent.

THE COURT: I don't find that impeaching. What he said was his view was he said was he didn't recall whether or not that was what he said, and I don't see that that's impeaching.

MR. BEBEL: Your Honor, with respect to impeaching the out-of-court declarant by way of the judgment and conviction, or even by way of other 404(b) acts, do you want us to brief that and bring it up to you at a later point in time? What's your preference?

THE COURT: If you feel better briefing it, you feel free to do that. See you at 2 o'clock.

(Recess.)

THE COURT: Mr. Hawkins, you have some questions?

BY MR. HAWKINS:

Q. Mr. Tinkham, I believe before the recess we were talking [114] about the meeting on the 26th with Mr. Struyk and the other individuals, including Mitou and Swanson, correct?

A. Yes.

Q. I'm not trying to pick words, sir, but one of the things was at that meeting, at least the subject that was discussed and the consensus that was reached was that the situation for Pillsbury on or about August 26th, 1988, was that they were going to be taken over by somebody, fair?

A. No.

THE COURT: Mr. Hawkins, you're going to have to speak up again.

THE WITNESS: That — that was — I'm sorry, Your Honor. Do you want to repeat the question?

BY MR. HAWKINS:

Q. One of the reasons espoused for a continued involvement in this matter was because it was clear, or it was apparent that

the status of Pillsbury was that somebody was going to take it over during this time frame, around August 26th, 1988?

A. I don't think that's quite accurate in terms of my perception at the time, because if somebody had been — had it been apparent that somebody was going to take it over, the stock price would have been climbing. What was apparent yes that Pillsbury was not a very strong company, and that either it was going to get stronger, that somebody was going [115] to acquire it, that its management was going to get better, something had to happen, and something had to happen relatively soon, but what, was another matter.

Q. Did you tell those people at that meeting that a takeover was imminent?

A. I don't recall using those words.

Q. Did you tell them a takeover was going to happen sooner or later?

A. I don't recall saying that either. I recall saying more along the lines what I just described to you. That that was one of the possibilities.

Q. On the other hand, there was a concern about the fact that Grand Met had holdings in South Africa, correct?

A. Yes.

Q. And another concern about continued representation was the fact that they were involved in the wholesale liquor business?

A. That was a minor concern.

Q. And it was determined that at least for the present, they would agree that whether or not continued representation would occur would be subject to another meeting, and some of these issues would be looked into, correct?

A. Yes.

Q. And approximately 14 or 15 days later, two weeks, a [116] decision was made for the firm to withdraw?

A. Ah, approximately. It was made about, umm, oh, the 8th or 9th or so of September.

Q. And back to on or about August 24th, 25th, 26th, you're aware of a lot of conversation in the Twin Cities area about Pillsbury being a takeover target, correct?

A. No.

Q. Didn't talk to anybody about it?

A. I don't recall talking to anybody about it being a likely takeover target.

Q. No conversation with any people in the business community about newspaper articles?

A. No, I don't think so.

Q. Did you read the newspaper articles about Pillsbury?

A. I sure did.

Q. And that was not a discussion you engaged in with anybody?

A. Oh, I don't know, I can't answer that absolutely. I — I don't recall ever talking to somebody in the business community about it. That I think I might remember.

Q. Did you ever talk to a friend of yours by the name of Tom Kelly about it when you were running over the noon hour?

A. I don't recall.

Q. Is that something you guys would have talked about?

A. Umm, not specifically, no.

[117] Q. He's a lawyer, correct?

A. Correct.

Q. Good friend of yours?

A. He is.

Q. Do you remember talking to any people over at the Minneapolis Athletic Club during the lunch hour about all the conversation about, or the newspaper articles about Pillsbury?

A. No, I don't.

Q. Is it fair to say you don't invest in stocks very much?

A. Ahm, no, that's not fair to say.

Q. Okay. Do you consider yourself a sophisticated investor as Mr. O'Hagan is?

A. No.

Q. He's quite a sophisticated investor, correct?

A. I don't know, but I don't consider myself a sophisticated one, and I don't know whether he is or not.

Q. Okay, Now, in regard to your tenure with Dorsey and have you ever opened a takeover file?

A. Umm, other than participating in this one, I don't believe so.

Q. Did you open the file in this case?

A. Ah, my memory is that Peter Dorsey initiated it, but I sure signed it.

Q. And that would relate to the conversation you had with [118] Mr. Struyk about opening the file on or about July 30th, 1988?

A. Well, he and I talked about it, I don't know if that date's correct.

Q. Do you recall testifying on November 22nd, 1988, that you've never opened a takeover file?

A. Ah, I don't remember that, but, ah, that may well be.

Q. Direct your attention to page 25, folio 21, 22, 23, just read that to yourself and tell me when you're completed?

A. I'm through.

Q. Does that refresh your recollection?

A. Yes.

Q. Is that a fair recitation of what your testimony was?

A. I believe it is.

Q. It's kind of hard to keep all this stuff straight sometimes, isn't it?

A. Well, some of it.

MR. HAWKINS: I have no further questions, Your Honor.

THE COURT: Any further direct?

MR. BEBEL: Can we have a minute, Your Honor?

THE COURT: Certainly.

(Pause)

MR. BEBEL: And we have nothing further.

THE COURT: You may step down, Mr. Tinkham, thank

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